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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,	
Plaintiff and Respondent,	G040223
v.	(Super. Ct. No. 06WF2790)
DAVID GUTIERREZ, JR.,	O P I N I O N
Defendant and Appellant.	

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed.

Jennifer L. Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobeck and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant David Gutierrez, Jr., of receiving stolen property. (Pen. Code, § 496, subd. (d).) The jury could not reach a verdict on an additional charge that defendant unlawfully took a vehicle (Veh. Code, § 10851, subd. (a)), so the court declared a mistrial on that count. The court placed defendant on supervised probation for three years. On appeal defendant contends the court violated his constitutional rights by instructing the jurors they could single out and disregard his testimony and that of his parents. We disagree and affirm the judgment.

FACTS

In the late afternoon of July 8, 2006, Milton Avila's white 1996 Nissan Sentra was stolen from a carport near his Garden Grove apartment. Avila immediately reported the theft to the Garden Grove Police Department.

Three days later, a Santa Ana police officer found the car in an isolated public parking lot where he had previously recovered "roughly 10 to 12" stolen vehicles. The Sentra was unlocked and its interior was "disheveled" with "loose wiring." The center console (including the car radio) had been "ripped out." The car's right side mirror was damaged. The ignition mechanism was loose and the steering wheel would not lock.

The officer notified the car's owner, Avila. Upon Avila's arrival at the parking lot, the Santa Ana officer told Avila to "notify the Garden Grove Police Department to respond to the scene to do [a] crime scene investigation." Avila phoned the Garden Grove police who told him to drive the Sentra to the Garden Grove Police Department.

At the Garden Grove Police Department, a community services officer performed a "crime scene investigation" on the Sentra. He booked evidence of items in the car that did not belong to Avila. Avila did not recognize the following property in the

car's trunk: a box of baby girl clothes, a Sony car radio and compact disc player with the serial number scratched off, a Honda dashboard console, a speaker box, a compact disc holder, and a phone charger. Inside the car was more property that did not belong to Avila, including a Delphi satellite radio, speakers, power tools, a pair of vice grips, wire cutters, two screwdrivers, some wires and adapter cables, a glass pipe, a key, and a "boom box."

The community services officer dusted the car for latent fingerprints and made 13 latent fingerprint cards. According to a forensic specialist, defendant's fingerprints were found on the car's exterior right rear door, the cover of a compact disc holder found in the trunk, and a plastic package of baby socks in the trunk. Avila's prints were found on the car's rearview mirror.

Defense

An officer testified defendant's fingerprints were not found in the car's interior.

Defendant testified he lived with his parents in 2006 and had a baby girl who was about 2 years and 8 months old on the date of the car theft. He did not recognize Avila's car, the tools discovered inside the car, or any items found in the car's trunk. He offered the following explanation for the presence of his fingerprints on the car's exterior and on two items found in the car's trunk. He had been "at a Food 4 Less parking lot" when a man approached him and asked if defendant "wanted to buy some items" because the man "was in need of money." The car's trunk was open. Defendant looked at, and might have touched, some items in the trunk, but did not buy anything. He "probably lean[ed] against the car." He specifically recalled being shown a speaker box and a stereo, and holding one end of the speaker box.

Defendant's parents testified defendant lived with them in 2006. When shown photographs of the white Sentra and the tools found inside, the parents testified

they had never seen the car or the tools. Defendant's mother also testified she had never seen the baby girl clothes found in the car.

DISCUSSION

Defendant contends his rights to due process, equal protection and a fair trial were violated because CALCRIM No. 226 was read to the jury and "impermissibly singl[ed] out [his] testimony and the testimony of his parents, and instruct[ed] the jury to improperly use their interest in the outcome of the case, to undermine [defendant's] entire defense and infer dishonesty."

The court instructed the jury with CALCRIM No. 226 to assist the jury in its evaluation of the credibility of the witnesses.[1] One of the factors the jury was told to

[1] The court read the jury CALCRIM No. 226 as follows: "You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice you may have, including any based on the witness' gender, race, religion, ethnicity, age, national origin or socioeconomic status. You may believe all, part, or none of any witness' testimony. Consider the testimony of each witness and decide how much of it you believe. [¶] In evaluating a witness' testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors you may consider are: [¶] How well could the witness see, hear, or otherwise perceive the things about which the witness testified? [¶] How well was the witness able to remember and describe what happened? [¶] What was the witness' behavior while testifying? [¶] Did the witness understand the questions and answer them directly? [¶] Was the witness' testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided? [¶] What was the witness' attitude about the case or about testifying? [¶] Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony? [¶] How reasonable is the testimony when you consider all the other evidence in the case? [¶] Did other evidence prove or disprove any fact about which the witness testified? Has the witness engaged in any other conduct that reflects on his or her believability? [¶] Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people

consider was, "Was the witness' testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided?" Defendant claims this factor "impermissibly and exclusively focused on and singled-out [defendant] and his parents, because they were the only witness[es] who had any personal interest in the outcome of the case."

The People reply that defendant "waived his instructional error claim by failing to request any modification of CALCRIM No. 226 in the trial court to remedy the concerns claimed on appeal." We agree.

When a "standard instruction correctly and adequately explain[s] the applicable law to the jury," a court is "not required to rewrite it sua sponte." (*People v. Kelly* (1992) 1 Cal.4th 495, 535.) "'The trial court cannot reasonably be expected to attempt to revise or improve accepted and correct jury instructions absent some request from counsel.'" (*Ibid.*) A defendant may not "'complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete.'" (*People v. Valdez* (2004) 32 Cal.4th 73, 113.)

Moreover, CALCRIM No. 226 is a correct and accurate statement of the law on witness credibility. Under Evidence Code section 780, subdivision (f), "the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to . . . [¶] [t]he existence or nonexistence of a bias, interest, or other motive." Under Penal Code section 1127, a court must "inform the jury in all cases that the jurors are the exclusive judges . . . of the credibility of the witnesses." Our

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may witness the same event yet see or hear it differently. [¶] If you do not believe a witness' testimony that he or she no longer remembers something, that testimony is inconsistent with the witness' earlier statement on that subject. [¶] If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest."

Supreme Court has stated that a court has a sua sponte duty to give the substance of CALCRIM No. 226's primary predecessor instruction, CALJIC No. 2.20 (Believability of Witness), "in every criminal case, although [the court] may omit factors that are inapplicable under the evidence." (*People v. Horning* (2004) 34 Cal.4th 871, 910; see also Bench Notes to CALCRIM No. 226.) (CALJIC No. 2.20 provides: "Every person who testifies under oath [or affirmation] is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness. [¶] In determining the believability of a witness you may consider anything that has a tendency reasonably to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following: [¶] . . . [¶] The existence or nonexistence of a bias, interest, or other motive.") Our Supreme Court has stated that CALJIC No. 2.20's instruction "that '[i]n determining the believability of a witness you may consider anything that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness, including . . . [t]he existence or nonexistence of a bias, interest, or other motive'" (*People v. Carrera* (1989) 49 Cal.3d 291, 313), "delivered a correct interpretation of the law." (*Ibid.*)

Defendant argues that any objection he could have raised below would have been futile since "there is nothing that the opposing party or the trial court could have or would have done differently had the objection been made." This argument is speculative. Moreover, unless defendant's challenge to CALCRIM No. 226 was patently meritless, there is no reason the court would have refused to even consider modifying it. Of course, if there were nothing the court "could have" done differently, defendant has no cause to complain.

Defendant invites us to exercise our discretion to consider his claim even though he raises it for the first time on appeal. We decline to do so. Defendant has not demonstrated any reason he should be relieved of his responsibility to have given the lower court an opportunity to consider his concerns. His claim does not, for example,

present "a pure question of law on undisputed evidence regarding a noncurable substantive defect . . . or a matter affecting the public interest or administration of justice." (Eisenberg et al, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) [¶] 8:272, p. 8-172.)

Finally, defendant contends his instructional challenge was not waived because it involves his substantial rights. (Pen. Code, § 1259 [appellate court may review instruction not objected to below, if defendant's substantial rights are affected].) """The cases equate 'substantial rights' with reversible error, i.e., did the error result in a *miscarriage of justice*?""" (*People v. Christopher* (2006) 137 Cal.App.4th 418, 426-427.) There was no miscarriage of justice here. CALCRIM No. 226 did not single out the testimony of defendant and his parents, but was instead a neutral statement of factors the jury *could*, but was not *required* to, consider in assessing the credibility of any witness. Our Supreme Court's comments on CALJIC No. 2.21 (Witness Willfully False) (CALCRIM No. 226's other predecessor instruction) are illuminative here: "The instruction at no point *requires* the jury to reject any testimony; it simply states circumstances under which it *may* do so." (*People v. Beardslee* (1991) 53 Cal.3d 68, 95.)[2] "'CALJIC No. 2.21 does nothing more than explain to a jury one of the tests they may use in resolving a credibility dispute.' [Citation.] 'The weaknesses in [the defendant's] testimony should not be ignored or given preferential treatment not granted to the testimony of any other witness. As it has been aptly noted in other contexts, a defendant who elects to testify in his own behalf is not entitled to a false aura of

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[2] In 1991, CALJIC No. 2.21 stated: "'A witness willfully false in a material part of his testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point unless from all the evidence you shall believe the probability of truth favors his testimony in other particulars. [¶] However, discrepancies in a witness's testimony or between his testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience and innocent misrecollection is not uncommon.'" (*Beardslee*, at p. 94.)

veracity.'" (*Beardslee*, at p. 95.) "[T]he instruction is neutrally phrased and does not focus attention on a particular witness." (*People v. Turner* (1990) 50 Cal.3d 668, 699.) "Applying neutral standards of credibility to defense witnesses does not improperly 'lessen the prosecution's burden.'" (*Ibid.*)

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

O'LEARY, J.